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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/767,661	01/29/2004	Michael Svilar	10761.1467	5386

81331 7590 11/24/2009

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EXAMINER	
MCPHILLIP, ADRIAN J	

ART UNIT	PAPER NUMBER
3623	

NOTIFICATION DATE	DELIVERY MODE
11/24/2009	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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Office Action Summary	Application No.	Applicant(s)	
	10/767,661	SVILAR ET AL.	
	Examiner	Art Unit	
	Adrian J. McPhillip	3623	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *13 July 2009*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1,4,7,9-11,13,16,19 and 21-23* is/are pending in the application.

4a) Of the above claim(s) *none* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1, 4, 7, 9-11, 13, 16, 19, 21-23* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

1. This Final Office Action is in response to Applicant's communication filed on July 13, 2009. Claims 1 and 13 have been amended. Claims 2-3, 5-6, 8, 12, 14-15, 17-18, 20 and 24 have been cancelled. Currently claims 1, 4, 7, 9-11, 13, 16, 19, 21-23 are pending in this application.

Response to Amendment

2. Applicant's amendments to claims 1 and 13 are hereby acknowledged.

3. Applicant's amendments to claim 1 are sufficient to overcome the 35 U.S.C. 101, rejection, with respect to pending claims 1, 4, 7 and 9-11, set forth in the previous office action. However, it is noted that the amendments made to the claims are directed to features which do not appear to have support in the specification, specifically: using a computer processor to execute the method steps. As such, the rejections have been provisionally withdrawn pending the Applicant's ability to point out where in the specification the amended features are supported. Failure to do so would accordingly result in the reinstatement of the previously issued rejections.

4. Applicant's amendments to claim 13 are insufficient to overcome the 35 U.S.C. 101, rejection, with respect to pending claims 13, 16, 19 and 21-23, set forth in the previous office action. Accordingly this rejection is maintained. Furthermore, it is noted that the amendments made to the claims are directed to features which do not appear to have support in the specification, specifically: a computer-implemented system using computer–executable modules. A 112, first paragraph rejection of these features can be found later in this action.

Response to Arguments

5. Applicant's arguments filed on July 13, 2009 have been fully considered but are not persuasive. Applicant first attempts to traverse the Examiner's usage of Official Notice by asserting that the Examiner applied impermissible hindsight. Applicant's primary support for this assertion is that the Applicant's invention is at least 5 years old (see page 8 of the submitted Remarks), and dates back to at least January 29, 2004. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). Merely asserting the age of particular invention does not support the Applicant's position that the Examiner applied improper hindsight reasoning and does not shift the burden to the Examiner. Furthermore since the Examiner has relied only on knowledge which was within the level of ordinary skill at the time the claimed invention was made, such a reconstruction is proper and this argument is unpersuasive.

6. Applicant also argues the Examiner's usage of Official Notice by stating that the noticed fact is not so well-known as to be universally applied. The Examiner concedes that calculating and displaying percent error between forecast customer demand and actual customer demand is not the only way to compare forecast customer demand and actual customer demand. However, it is noted that the mere existence of alternate methods for comparing forecast and actual data,

does not itself prove that the specific method including the calculation and display of forecasted and actual percentages was not well known to those of ordinary skill in the art at the time of the invention. In the interest of compact prosecution the Examiner will provide a reference in support of the Officially Noticed facts. Gatto (US 20030065601 A1) discloses a security analyst performance tracking and management system where one embodiment comprises a graphical display wherein the vertical axis may display a measure of the average percent error, both positive and negative, of the estimate for each analyst displayed as compared to actual earnings (see at least ¶ [0110]-[0111]). Gatto supports the Examiner's assertion in the prior Office Action that it was well known to those of ordinary skill in the art, at the time of the invention, to calculate and display percent errors between forecasted data and actual data when evaluating the predictive capacity of a particular model, therefore this argument is unpersuasive.

7. Finally, the Applicant argues that Schroeder teaches away from displaying either actual data or percent error. Applicant's primary support for this assertion is that Schroeder "repeatedly refine[s] the prediction model by comparing predicted data with actual data ...." ¶78. Because "refin[ing]" is not something that is ordinarily done visually, integrating the alleged noticed fact into Schroeder is not appropriate in view of the purposes of Schroeder." (see page 9 of Remarks) MPEP, Section 2142.02 states that "the prior art's mere disclosure of more than one alternative does not constitute a teaching away from any of these alternatives because such disclosure does not criticize, discredit, or otherwise discourage the solution claimed...." *In re Fulton*, 391 F.3d 1195, 1201, 73 USPQ2d 1141, 1146 (Fed. Cir. 2004)." The bar then for establishing that a reference teaches away from a particular feature/solution is that the reference criticizes, discredits, or otherwise discourages the feature/solution claimed. The Examiner has not found,

and the Applicant has failed to present, any evidence that Schroeder criticizes, discredits, or otherwise discourages displaying either actual data or percent error. In fact it is unclear to the Examiner how one could repeatedly refine the model by comparing predicted data with actual data, as disclosed by Schroeder, without some form of display or visual representation of the predicted and actual data. For at least the aforementioned reason(s), Applicant's argument that Schroeder teaches away from displaying either actual data or percent error has been found unpersuasive.

Claim Rejections - 35 USC § 112

8. The following is a quotation of the first paragraph of 35 U.S.C. 112:

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

9. Claims 1, 4, 7, 9-11, 13, 16, 19, 21-23 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. Specifically, the Examiner has been unable to discern support for using a computer processor to execute the steps recited in claims 1, 4, 7 and 9-11, or for the system being a computer-implemented system using computer-executable modules. The lack of support for these features raises doubt as to possession of the claimed invention at the time of filing, and it is respectfully requested that Applicant specifically point out where these features are supported by the specification.

Claim Rejections - 35 USC § 101

10. 35 U.S.C. 101 reads as follows:

> Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

11. Claims 13, 16, 19, 21-23 are rejected under 35 U.S.C. 101 as being directed towards non-statutory subject matter. Claims 13, 16, 19, and 21-23 are directed toward a system comprising various modules. The claims do not positively recite elements that necessarily constitute a system or apparatus, rather the claims could be directed to software. *Software per se* is not patentable under § 101; therefore, the claimed invention does not fall within a statutory class of patentable subject matter.

Claim Rejections - 35 USC § 103

12. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

13. The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

14. Claims 1, 4, 7, 13, 16 and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schroeder et al. (US 2003/0130883) – hereinafter Schroeder, in view of Examiner's Official Notice as supported by Gatto (US 20030065601 A1).

15. Regarding **claim 1 and 13**, Schroeder discloses a computer-implemented method and system for using econometric techniques to quantify marketing drivers and forecast consumer demand and shipments, by using comprising:

- providing at least one marketing plan, wherein the at least one marketing plan comprises at least one marketing element (see paragraphs 57-58 and fig 1 wherein proposed promotions/marketing plans are entered into the modeling system);
- using econometric modeling to quantify the effect of the at least one marketing element on shipments (see paragraph 50 wherein the predicted effects of the promotion in question are determined and include an analysis of expected ship quantities. Furthermore paragraph 39 discloses using regression as a method of analyzing the data in question);
- forecasting consumer demand and shipments in response to the at least one marketing plan and results of the econometric modeling (see paragraph 73 wherein the business planner builds shipment estimates and predicts supply chain demand related to the implementation of a particular promotion);
- executing a what-if scenario by enabling a user to make a change in planned spending on the at least one marketing element and using econometric modeling to quantify the effect of the change in planned spending on consumer demand and shipments (see paragraph 29 where planned spending regarding promotional activities are entered

into the system. Paragraphs 59-68 then disclose a lift model that details the effects/lift of various promotions, which includes calculating sales and profit figures based on consumer demand and shipping information. Users may then tweak various aspects of the promotion in order to forecast and compare the effects of the different promotions being considered.);

- modifying the at least one marketing plan based on the results of the what-if scenario to generate a modified marketing plan (see paragraph 59 wherein if the predicted results are in alignment, then the promotion may proceed to completion. If the predicted results are not in alignment, then a decision is made whether to modify the promotion plans or operation plans);
- executing the modified marketing plan and capturing actual consumer demand and shipment data (see paragraph 59 wherein the modified plan is implemented and paragraph 102 wherein an embodiment of the invention captures actual demand and shipment data. Additionally claim 35 captures shipping volume to market data and uses it to estimate sales);
- displaying predictions pertaining to the planned promotion (see claim 43) and utilizing actual sales data to repeatedly refine the prediction model by comparing predicted data with actual data to maximize the model's utility and minimize future errors (see paragraph 78).

Schroeder does not explicitly disclose displaying both (i) the forecasted consumer demand, the actual consumer demand, and a first percent error between the forecasted consumer demand and

the actual consumer demand; and (ii) the forecasted shipments, the actual shipments, and a second percent error between the forecasted shipments and the actual shipments.

The examiner hereby takes official notice that it was well known to those of ordinary skill in the art, at the time of the invention, to calculate and display percent errors between forecasted data and actual data when evaluating the predictive capacity of a particular model. Schroeder in fact discloses the comparison of forecasted and actual data but does not explicitly calculate percentages between the two. It was however, well known at the time of the invention to calculate the percentage difference between actual and forecasted data, for example Gatto (US 20030065601 A1) discloses a security analyst performance tracking and management system where one embodiment comprises a graphical display wherein the vertical axis may display a measure of the average percent error, both positive and negative, of the estimate for each analyst displayed as compared to actual earnings (see at least ¶ [0110]-[0111]).

Following KSR, the Supreme Court issued several rationales for supporting a conclusion that a claim would have been obvious. If a particular known technique was recognized as part of the ordinary capabilities of one skilled in the art, and one of ordinary skill in the art would have been capable of applying this known technique to a known device (method, or product) and the results would have been predictable to one of ordinary skill in the art; then the claim will be deemed obvious in view of the prior art.

Applicant is applying a known technique, in this case calculating and displaying percent errors between forecasted data and actual data, to a known device, in this case to forecasted and actual consumer demand as well as forecasted and actual shipments, both of which are known elements disclosed by Schroeder, and is generating a predictable result. It would have been

obvious, to one of ordinary skill in the art, that the result of applying the aforementioned technique would be a method for generating a predictive model that displayed the forecasted consumer demand, the actual consumer demand, and a first percent error between the forecasted consumer demand and the actual consumer demand as well as the forecasted shipments, the actual shipments, and a second percent error between the forecasted shipments and the actual shipments. Therefore since the Applicant is claiming the application of a known technique to a known device to yield a predictable result, the claim is deemed obvious in view of the prior art.

16. Regarding **claims 4 and 16**, Schroeder discloses a method and system to quantify marketing drivers and forecast at least one of consumer demand and shipments further comprising calculating a lift parameter of the at least one marketing element (see fig 1 and 2 wherein a lift model calculates the predicted lift that should result from a particular promotion and also paragraph 58).

17. Regarding **claims 7 and 19**, Schroeder discloses a method and system to quantify marketing drivers and forecast at least one of consumer demand and shipments wherein the at least one marketing element comprises at least one of promotions, advertising, points of distribution and product changes (see figs 1-2 and paragraphs 18-28 wherein the marketing element being analyzed is disclosed to be a promotion).

18. Claims 9-11 and 21-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schroeder (US 20030130883 A1) in view of Examiner's Official Notice as supported by Gatto (US 20030065601 A1), and further in view of Cox et al. (US 20020143604 A1) – hereinafter Cox.

19. Regarding **claims 9-11**, and **21-23**, Schroeder discloses a method and system to quantify marketing drivers and forecast at least one of consumer demand and shipments but fails to explicitly teach tracking the reasons for the forecast errors along with the forecast errors themselves.

Cox, however, discloses tracking the accuracy of a predictive model to assess its effectiveness as well as refining model assumptions (see paragraph 128), which are the reasons for the solution that the predictive model comes to. Therefore Cox effectively discloses tracking the errors, in the form of the differences between the predicted and actual values, as well as tracking and eventually refining the reasons for the errors, in the form of the assumptions used by the model to arrive at its predictions.

It would have been obvious to one of ordinary skill in the art, at the time of the invention, to modify the method of Schroeder to include tracking the reasons for the forecast errors along with the forecast errors themselves in order to increase the accuracy of future predictions and enhance the effectiveness of the overall model. Since both references are interested in accurately forecasting demand and since the modification could have been performed readily and easily by one of ordinary skill in the art, with neither undue experimentation nor risk of unexpected results, a rejection under 35 U.S.C 103(a) is appropriate.

Conclusion

20. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Adrian J. McPhillip whose telephone number is (571)270-5399. The examiner can normally be reached on Monday to Thursday 7:30 - 5:00 EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Beth Boswell can be reached on (571)272-6737. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/A. J. M./
Examiner, Art Unit 3623

11/16/2009

/Beth V. Boswell/

Supervisory Patent Examiner, Art Unit 3623